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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA,
Appellant,

vs.

MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,
Appellee.

On Appeal from the Judgment of the Court of Appeal, State of California, First Appellate Division

APPELLANT'S REPLY BRIEF

INTRODUCTION

This brief replies both to the brief of appellee and to the *amici curiae* brief submitted by the National Institute of Municipal Law Officers. These briefs have attempted to shift the focus of this case from an analysis of the protections of the Fourth and Fourteenth Amendments to an *in terrorem* defense of legislative programs of public health and urban renewal.

Such a shift in emphasis confuses the question at issue here and distorts the true effect of a warrant procedure in a health inspection. We are concerned with basic constitutional rights; to say that the progress of civilization in fighting disease and sub-standard living conditions will be halted unless these rights are found not to exist, is to exalt expediency over the human values upon which our government rests.

Appellee and *amici* aggregate several dissimilar problems in seeking to free the health inspector from constitutional standards. *Amici* rely upon the spectre of an urban population in *present* danger of fire or disease from such hazards as garbage accumulation and faulty electrical systems. Appellee's brief goes much further without warning us as to how far the argument—and the immunity from usual safeguards—goes. Under the San Francisco Municipal Code *all* residences may eventually be subject to inspection whether or not there is any reasonable ground to believe that the particular residence or residential area constitutes any danger whatsoever to the public health. (See App. Br. 44.) The so-called "planned area inspection" (one of the "routine inspection" often referred to) is authorized by the Code not only for presently blighted areas but also for the so-called "conservation area," which is defined to include "an area which is to be *protected from* blighting influences and *maintained* in a safe and sound state. . . ." (S. F. Mun. C. Ch. XII, sec. 203.3; R. 77, emphasis added.) In other words, the type of inspection for which appellee seeks immunity from probable cause

and warrant requirements extends not only into areas of present danger, but also into areas in which there is no such danger to the public. Ultimately, this means any residential area.[1]

I

APPELLEE WOULD ALLOW HEALTH INSPECTIONS AN IMPROPER EXEMPTION FROM CONSTITUTIONAL CONTROL.

"The search of a private dwelling without a warrant is, *in itself,* unreasonable and abhorrent to our laws." *Agnello v. United States,* 269 U.S. 20, 32, 70 L.ed. 145, 149 (1925) (emphasis added.) The pre-*Frank*[2] cases cited in appellant's brief (AOB 14-16) are not to be distinguished on the ground that they do not concern health inspectors. Indeed, they do not mention health inspectors. However, these cases show that in *varied* circumstances the courts have been scrupulous in upholding the security protected under the Fourth Amendment by requiring the searching officer to have a warrant except under circumstances amounting to necessity. Short of *Frank,* nothing in our constitutional history grants a peculiar immunity from this requirement to the health inspector.

Appellee seeks to transform the *Frank* decision from one resting on a constitutionally unsupportable

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[1]Not involved in this case, and conceded to be proper subjects for inspection without warrant, are (1) new construction, (2) repairs done under a building permit, and (3) the common areas of multiple residences such as hallways and fire escapes.

[2]*Frank v. Maryland,* 359 U.S. 360, 3 L.ed.2d 877 (1959).

premise to one in which the Court "merely" reached a balance of conflicting constitutional claims. It is begging the question when appellee in its brief characterizes the *Frank* decision as one which "recognizes a general right to be secure from unreasonable official intrusion into personal privacy. The Court holds only that this right of privacy is subject to the public welfare in the circumstances before it." (App. Br. 20.) The *Frank* decision obliterated the "general right" to constitutional protection "in the circumstances before it" by relying on a doctrine that the protections of the Fourth Amendment apply only in those circumstances wherein the search was to obtain incriminating evidence. *Frank v. Maryland,* 359 U.S. 360, 365-66, 3 L.ed.2d 877, 881-82 (1959).

Now, at this late date, appellee appears to assert that *Frank* should at least be extended beyond protecting Fifth Amendment rights to mean that the Fourth Amendment offers protection of any *other* constitutional right such as those present in the First Amendment. Appellee, whether wittingly or not, urges the same doctrine as *Frank,* though on a broader scale. Appellee significantly states (App. Br. 29):

> "The Fourth Amendment does, of course, protect these rights; the First and Fifth Amendments compel this result."

Appellee is wrong. It is the Fourth Amendment which compels this result, independently of the First or Fifth Amendments. There is scant basis upon which to conclude—as did *Frank* and as now does appellee—that the Fourth Amendment is a procedural

constitutional right designed only to protect substantive rights appearing in other provisions of the Constitution. The Fourth Amendment was intended to have and does have constitutional content in and of itself. "It [the law of searches and seizures] reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him." *Davis v. United States,* 328 U.S. 582, 587, 90 L.ed. 1453, 1457 (1946.)

Appellee places great reliance upon what is described as a pragmatic test of "reasonableness" under the Fourth Amendment used in *United States v. Rabinowitz,* 339 U.S. 56, 94 L.ed. 653 (1950).

We believe that all the opinions in *Rabinowitz* are important to recall in interpreting the Fourth Amendment. Would that the following passages had been recalled when the decision in *Frank v. Maryland* was written:

> "It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in *Boyd v. United States* [other citations omitted] . . . or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.
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> * * *

> "When the Fourth Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant justifies it, barring only exceptions *justified by absolute necessity.*
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> * * *
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> "With only rare deviations, such as today's decision, this Court has construed the Fourth Amendment 'liberally to safeguard the right of privacy.'"[3]

Appellee alludes to, but does not produce, a "long history of warrantless health inspections." (App. Br. 36.) Certainly the majority opinion in *Frank* does not present such a history since the examples there deal primarily with "statutes allowing inspection to enforce standards for the manufacture or shipping of various items of trade." *Frank v. Maryland,* 359 U.S. 360, 368, 3 L.ed.2d 877, 833, fn. 5 (1959). The opinion does manage to isolate a colonial Pennsylvania statute, an Eighteenth Century Maryland law, and the Baltimore ordinance under scrutiny in the case itself. Even the existence of such a history would not be determinative. "[A] power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the Constitution was designed to guard against. . . ." Cooley Constitutional Law 71 (1st ed. 1868).

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[3] *United States v. Rabinowitz,* 339 U.S. 56, 69, 70, 74, 94 L.ed. 653, 662, 664 (1950) (Frankfurter, J., dissent) (emphasis added).

As for the several state decisions which appellee cites as reflecting a general judicial trend favoring the result in *Frank v. Maryland* (App. Br. 38-40), suffice it to say that the bulk of these decisions arose after *Frank* and were directly encouraged by *Frank*.

Nor can the asserted immunity of health inspections from constitutional restraints be justified by a detailed statement as to how the purposes and procedures of a health inspection differ from those of a criminal search. All types of searches will have differences among themselves to varying degrees. There is nothing *sui generis* about a health inspection. A search for fugitives may take on the character of an inspection and yet run athwart Fourth Amendment protections. See *Lankford v. Gelston*, 363 F.2d 197 (4th Cir. 1966), where an injunction was issued against such a search. All searches of the home have at least one thing in common: They intrude upon the security of one's home. While at times the intrusion may be necessary, it is clearly unreasonable where—except in the circumstance of necessity—the decision as to whether that intrusion should be made or not is determined by the person making or otherwise responsible for the search. The essence of a warrant procedure is that it inserts the impartial judge into a position to protect against that determination being arbitrary or without probable cause. See *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L.ed. 436, 440 (1948); *McDonald v. United States*, 335 U.S. 451, 455-56, 93 L.ed. 153, 158 (1948); *Stanford v. Texas*, 379 U.S. 476, 485, 13 L.ed.2d 431, 437 (1965).

II

A REASONABLE SEARCH WARRANT PROCEDURE WILL NOT INHIBIT PUBLIC HEALTH PROGRAMS OR URBAN RENEWAL.

The briefs of appellee and *amici* concentrate on the problems of urban congestion, property depreciation and sub-standard housing conditions. These briefs bolster their positions by claiming that a system requiring warrants would place federal, state and local programs designed to meet urban problems in total jeopardy. In reality, the briefs merely justify these programs. However, the issue in this case is not whether public health programs or urban renewal can be justified.

Certainly there is nothing in the federal Housing Act in its requirement of a "workable program . . . to eliminate, and prevent the development or spread of, slums and urban blight" (42 U.S.C. sec. 1451(c) (Supp. I, 1965)), that commands that a "workable program" cannot include a reasonable search warrant procedure. Certainly there is nothing in the purpose of the San Francisco Housing Code "to provide minimum requirements for the protection of life, limb, health, property, safety and welfare of the general public and the owners and occupants of residential buildings" (S.F. Mun. C., Ch. XII, sec. 103; R. 76) that requires that these goals be reached without affording occupants the constitutional protections of a search warrant.

It is true that there are real problems present in protecting the public health. These problems are here today and have not been solved by the present system,

which permits searches without warrants. We agree with appellee in quoting the following (App. Br. 13):

> "Without question, the failure to enact, improve, *soundly administer, and effectively enforce adequate* local codes, more than any other single cause, accounts for the huge tasks of the present urban renewal effort. * * *" (Emphasis added.)

Given an adequate local code, *the lack of enforcement,* whether through financial limitations or administrative inaction, is the real cause for urban blight. If the New York grand jury investigation, so prominent in the briefs, offers "the compelling reason" (App. Br. 11) justifying appellee's position, then this example illustrates the basic fallacy in this position. All it shows is a failure to enforce the law, remedied by a special grand jury inspection team. The example does not show that the power to force searches without warrants was necessary to uncover the violations.

There is no justification in appellee's characterization of a warrant procedure as a "fixed formula" (App. Br. 8, 21) which would stifle programs of public health and urban renewal. Certainly we require a warrant. What remains "unfixed" is whether particular facts are sufficient to constitute a probable cause to obtain a warrant for a health inspection. This is not the case to determine whether probable cause existed for a search warrant since no search warrant was applied for. However, "probable cause" in a health inspection situation need not require the same type of showing as required in a criminal matter. For example, observations of the inspector both as to the

home involved and the immediately surrounding homes may show probable cause. Ultimate, however, is the necessity that there be some meaningful judicial check upon the administrator's power to force a search. Moreover, there is no demonstration that the requirement of a warrant even on a house-to-house basis will so restrict the routine inspection or other administration search as to destroy programs of public health and urban renewal. If, as the *amici* admit, "the overwhelming majority of building and home owners feel their interests lie in permitting such inspections, and welcome the periodic visits of municipal inspectors" (A.C. Br. 15), most of appellee's concern seems groundless. Only one example has been presented to the contrary. Appellee notes that over a three-year period a certain number of instances arose wherein the residents of San Francisco declined voluntarily to allow a fire inspector into their homes. (App. Br. 48-49.) However, nothing can be concluded from such raw figures.[4] The figures do indicate a certain value which citizens place on privacy from official intrusion without cause or complaint.

In short, the main thrust of the briefs opposing appellant has been to cloud the issue by placing the basis of their opposition to the use of search warrants upon the justification of programs of public health and urban renewal. We all admit the importance of these programs. The problems they attempt to meet

[4]We do know, however, that the inspections were not considered very important because no follow-up was made on the refusals. We also know that the ordinance was recently amended to require consent for such inspections. (See App. Br. 48, note.)

have been with us for many years, years in which a warrant procedure was not required. It has become apparent that the lack of adequate codes and enforcement is the real difficulty which has faced us and continues to face us. There is nothing which demonstrates that a probable cause and warrant procedure must inhibit the proper enforcement of housing standards.[5]

III

A SCHEME ALLOWING HEALTH INSPECTIONS WITHOUT WARRANTS DOES NOT GIVE PROTECTION EQUAL TO A SYSTEM WHICH REQUIRES SEARCH WARRANTS.

It was only natural that appellee would assure us that the security of one's home receives from the present system "substantially equivalent protection against arbitrary inspections" as from a system requiring a warrant. (App. Br. 40.)

Appellee argues, for example, that were the health inspector to appear with a search warrant in hand at the door, he could force immediate entry. He could not be required to return at a more convenient time. (App. Br. 24.) However, we submit that the mere appearance of a government inspector, armed with the ready reply, "The law doesn't require me to have a search warrant," will have an equally successful effect upon a substantial number of persons. More-

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[5]Appellee's comment that there is no provision for the issuance of search warrants for health inspections in either the city ordinances or state law (App. Br. 4) is obviously irrelevant. Should this Court require a search warrant, it is equally obvious that legislative means are at hand to supply the omission.

over, there is nothing that requires that the standards and procedural steps of the San Francisco ordinance and actual practice as outlined by appellee (App. Br. 43, 44-47) will be lost by the institution of a search warrant procedure. If the San Francisco ordinance is designed and enforced with due regard to the concern of individuals, we see no reason to suppose that the addition of a reasonable search warrant procedure would cause the Board of Supervisors to remove the present protections or change the practice of seeking a convenient time for the search. Indeed, it may be that constitutionally they may not. Reasonable notice and reasonable time may be required portions of search warrant procedure where no emergency is involved.

Finally, the fact that section 503 of the Municipal Code requires as one of its standards that the inspection be "only when necessary for the performance of the duties" of the inspector is hardly an adequate substitute for the element of probable cause, as appellee urges. (App. Br. 43-44.) One is not hard put to imagine a police officer illegally forcing entry into a home in the necessary performance of his duty, at least in the mind of the officer. The point is that the standards and procedures provided in section 503 are irrelevant to the element of probable cause. These standards and procedures mainly determine only *how* the inspection is to take place. The question as to *whether* it should take place is characterized only in terms of the official carrying out his "duties." Nor does the present practice answer the question of which portions of the premises may be searched even if the entry is in per-

formance of duties. See *Trupiano v. United States*, 334 U.S. 699, 710, 92 L.ed. 1663, 1667 (1948). The inspector may well be carrying on his duties in performing a routine inspection under section 86 of the Municipal Code (R. 36-37) and yet in doing so violate a constitutional standard of conduct.

CONCLUSION

The constitutional protection of the security of one's home through the use of the search warrant applies to all invasions of the home by the government. The health inspection is not to be peculiarly immune. There is no justification for the argument that a reasonable search warrant procedure will inhibit either public health programs or urban renewal.

The San Francisco ordinances before the Court violate the constitutional protection of security of the person in his home. Therefore, it is respectfully submitted that the judgment of the Court below should be reversed.

Dated, San Francisco, California,
February 1, 1967.

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